

February 14, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jeffrey T. Richelson

Date of Filing: June 15, 2005

Case Number: TFA-0105

Jeffrey T. Richelson filed an Appeal from a determination that the Office of Emergency Response of the National Nuclear Security Administration (NNSA) issued on May 19, 2005. In that determination, the NNSA denied a request for information that the Appellant had submitted on July 22, 2002, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The information sought was withheld after the NNSA determined that the document contained unclassified controlled nuclear information (UCNI) and other information the disclosure of which would result in circumvention of agency rules. This Appeal, if granted, would require the DOE to release the information that the NNSA withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On July 22, 2002, Mr. Richelson requested, among other documents, a copy of the October 1993 “NEST [Nuclear Emergency Search Team] Energy Senior Official’s Reference Manual.” The Office of Emergency Response, which had control over that document, responded to the request by withholding virtually all of the manual from Mr. Richelson. In his May 19, 2005 determination letter, the program manager of the Office of Emergency Response stated that portions of the manual contained UCNI, the disclosure of which is prohibited by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*, and therefore warranted protection from disclosure under Exemption 3 of the FOIA. In addition, he stated that other portions of the manual contained information about the categorization of information into various levels of classification, and warranted protection from disclosure under Exemption 2 of the FOIA, because their disclosure was “likely to

result in circumvention of a legal requirement.”

The present Appeal seeks the disclosure of the manual described above. In his Appeal, Mr. Richelson contends that a significant amount of the information in the manual has been released to the public since its publication. He also challenges the appropriateness of the determination that the contents of the manual are UCNI.

II. Analysis

Exemption 3 of the FOIA provides for withholding material "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 29 DOE ¶ 80,171 (2004). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2168(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of the Office of Security has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Deputy Director of Operations of the Office of Security and Safety Performance Assurance. Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Director reviewed the manual that Mr. Richelson requested.

According to the Deputy Director, the DOE determined on review that, based on current DOE classification guidance, the requested document contains UCNI. The information that the DOE identified as UCNI concerns the operational details of the NEST. The DOE also determined, however, that the majority of the document's content is not UCNI. The Deputy Director has provided this Office with a copy of the document from which the UCNI has been deleted. Beside each deletion, "DOE (b)(3)" has been written in the margin of the document. The denying official for these withholdings is Michael A. Kilpatrick, Deputy Director of Operations, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Director's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the

Deputy Director has now determined to be properly identified as UCNI must be withheld from disclosure. Nevertheless, the Deputy Director has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Director's findings, and at his suggestion, we remanded this manual to the NNSA's Office of Emergency Response for a new review, to consider whether the FOIA dictates that other, previously withheld portions of the document, including those previously withheld under Exemption 2, should not be released to Mr. Richelson. After completing its review, the Office of Emergency Response informed this Office that no portions of the manual were withholdable other than those identified as UCNI by the Deputy Director. Accordingly, Mr. Richelson's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by Jeffrey T. Richelson on June 15, 2005, Case No. TFA-0105, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) A newly redacted version of the October 1993 "NEST [Nuclear Emergency Search Team] Energy Senior Official's Reference Manual" will be provided to Mr. Richelson under separate cover.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 14, 2006